IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES SHAW, et al.,	:	CIVIL ACTION
	:	NO. 97-5184
Plaintiffs,	:	
	:	
v.	:	
	:	
DALLAS COWBOYS FOOTBALL CLUB, LTD, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

AND NOW, this **9th** day of **May**, **2001**, upon consideration of plaintiff's unopposed motion for preliminary approval of the stipulation and settlement agreement (doc. no. 87), dated February 5, 2001 ("Settlement Agreement"), and based on the reasoning contained in the accompanying memorandum, it is **ORDERED** that:

1) This action shall be maintained, for settlement purposes, as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, with a class defined as follows:

> All person in the United States who have purchased one or more residential subscriptions to NFL Sunday Ticket at any time from January 1, 1994 through May 25, 2001.

This conditionally-certified class action shall be maintained with Bret D. Schwartz and Steve Promislo as class representatives and with class counsel consisting of the law firms of Levin, Fishbein, Sedran & Berman, 510 Walnut Street, Suite 500, Philadelphia, Pennsylvania 19106; Milberg Weiss Bershad Hynes &

Lerach, 600 West Broadway, 1800 One Americas Plaza, San Diego, California 92101-5050; as well as those law firms identified as counsel for plaintiffs in the amended complaint (See doc. no. 36 at 14).

2) The certification of the class is conditioned on final approval of the settlement, and, in the event the settlement is not approved, the certification shall be vacated;

3) The court finds that the Settlement Agreement attached to the parties' motion, appears, upon preliminary review, to be fair, adequate, and reasonable, and shall be submitted to the class members for their consideration and for a hearing to determine whether the settlement will be approved by the court;

4) Pursuant to Rule 23(c)(2) and (e), the court approves the proposed notice (to be sent by first class mail to putative class members) and the proposed summary notice (to be published in USA Today) submitted to this court on March 9, 2001;

5) By May 25, 2001, class counsel, through the settlement administrator, Rust Consulting, Inc., shall mail by first-class mail, the proposed notice regarding the pendency of the class settlement (in substantially the form submitted to the court on March 9, 2001) to all persons whom the parties have been able to determine through their best efforts are class members and with respect to whom the parties have been able to obtain a current or last known mailing address. By May 25, 2001, class

counsel, through the settlement administrator, shall publish the summary notice (in substantially the form submitted to the court on March 9, 2001) in one issue of USA Today;

6) A hearing shall be held on July 9, 2001 at 9:30 a.m., in Courtroom 7A, United States Courthouse, 601 Market Street, Philadelphia, PA, to consider the fairness, reasonableness and adequacy of the settlement, the fairness of the proposed plan of distribution of the settlement proceeds, the dismissal of the complaint in this action, the request for attorneys' fees, the request for incentive awards to the named plaintiffs, and other related matters;

a) At the hearing, any class member may appear in person or by counsel (if an appearance is filed and served as hereinafter provided) and be heard to the extent allowed by the court in support of, or in opposition to, the fairness, reasonableness and adequacy of the settlement, the plan of distribution, and/or the request for incentive awards to the class representatives, provided, however, that no person shall be heard in opposition thereto and no papers or briefs submitted by any such person shall be accepted or considered by the court unless, on or before June 25, 2001, such person: (i) has filed with the Clerk of the Court a notice of such person's intention to appear together with a statement that indicates the basis for such opposition along with any supporting documentation

(including evidence indicating that he or she is a member of the class) and (ii) has served copies of such notice, statement, and documentation together with copies of any other papers or briefs filed with the court, either in person or by mail, upon the following counsel:

Howard J. Sedran, Esq.
Levin, Fishbein, Sedran & Berman
510 Walnut St., Suite 500
Philadelphia, PA 19106
On behalf of plaintiffs

Peter Nickles, Esq.
Covington & Burling
1201 Pennsylvania Ave., NW
P.O. Box 7566
Washington, D.C. 20004
On behalf of settling defendants

b) Class counsel and defendant's counsel should be prepared at the hearing to respond to any objections filed by the class members and to provide other information, as appropriate, bearing on whether or not the settlement should be approved;

7) On June 25, 2001, class counsel shall cause to be filed with the clerk of this court affidavits or declarations of the person or persons under whose general direction the mailing of the notice to class members and publication of the summary notice was accomplished, showing that such mailings and publication have been made in accordance with this Order.

8) Any class member who wishes to be excluded from the settlement class shall send a letter to the post office box

designated in the notice for receipt of exclusion requests. To be effective as an exclusion request, the letter must be post-marked no later than June 25, 2001 and must contain (a) the class members's name, address and telephone number and (b) a statement indicating that the sender of the letter wishes to be excluded from the class.

9) Any person who believes that he or she is a member of the class shall be entitled to establish the right to participate in the distribution of the proceeds of the settlement fund, and other aspects of the settlement terms, by filing a proof of claim form by June 25, 2001, unless extended for good cause shown.

10) By June 25, 2001, the class representatives shall submit an affidavit in support of an incentive award based on the time and effort expended on their part in pursuing the litigation;

11) The court reserves the right to adjourn the settlement hearing from time to time without further notice of adjournment announced in open court.

The court's order is based on the following reasoning:

On August 13, 1997, representative plaintiffs Bret D. Schwartz and Steve Promislo filed this class action suit against the National Football League ("NFL") and five of its teams.[1]

[1] The team-defendants are the Dallas Cowboys Football Club, Ltd., the New England Patriots Football Club, the New York

Although not individually named as defendants in the case, the complaint alleges that the other twenty-five teams of the NFL acted as co-conspirators. Plaintiffs allege that defendants violated the antitrust laws of the United States with respect to the NFL's contract with DirectTV whereby DirectTV sells a satellite television package of all Sunday games ("NFL Sunday Ticket") for the entire regular season of the NFL. The plaintiffs allege that the NFL and its thirty teams "contracted and agreed to set the prices at which the NFL, and its member teams, would sell broadcast rights through NFL Sunday Ticket and contracted and agreed to restrict the output of the broadcasts of their games in non-exempt channels of distribution." Therefore, the plaintiffs in their complaint seek (1) an injunction preventing the defendants from continuing their alleged unlawful contract, combination, and conspiracy; (2) treble damages sustained by plaintiffs; and (3) costs for bringing the lawsuit, including reasonable attorneys' fees.

After three-and-a-half years of litigation, the parties have executed a Settlement Agreement, a copy of which counsel has attached to their joint motion for preliminary approval of the stipulation and settlement agreement. Under the Settlement Agreement, the class is "comprised of all persons in the United States who have purchased one or more residential subscriptions

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Football Giants, Inc., the Philadelphia Eagles Limited Partnership, and the San Francisco Forty-Niners, Ltd.

to NFL Sunday Ticket at any time from January 1, 1994 through" the mailing date of notice to the class. At the hearing on preliminary approval of the Settlement Agreement, the plaintiffs asserted that the class size numbers over 1.8 million individuals.

Under the terms of the Settlement Agreement, the defendants will establish a settlement fund of $7.5 million. Class members will be entitled to a pro-rata share of the settlement fund whereby each class member will receive one share for each year they purchased NFL Sunday Ticker. The settlement fund will not be reduced by administration expenses or attorneys' fees and expenses. Instead, the defendant will pay separately up to $2.3 million for the cost of notifying the class members and administering the settlement fund. To the degree that the administrative costs exceed $2.3 million, those additional costs will be deducted from the settlement fund. Similarly, attorney's fees and expenses, totaling approximately $3.7 million, will not be deducted from the settlement fund but will be paid separately by the defendant.

In addition to a pro-rata share of the settlement fund, all class members will be entitled to a 10% discount on all merchandise purchased at the website, NFL Shop, for up to $75.00. Those class members who purchased subscriptions to NFL Sunday Ticket for three or more seasons during the 1994-2000 seasons,

will be entitled to a 15% discount for up to $150.

Under the Settlement Agreement, all class members will have the opportunity to purchase a new cable package, known as "Single Sunday Package," whereby a class member, beginning in the 2001 football season, may purchase for $29.99 a single Sunday of all the out-of-market NFL broadcasts, rather than the entire season of Sunday games.[2] Following the 2001 football season, in the event that the NFL's net subscription revenue is ten million dollars less than its baseline net revenue, as outlined in the Settlement Agreement, the NFL may discontinue Single Sunday Ticket. After the 2002 football season, the NFL in its sole discretion, may cancel Single Sunday Ticket.

All class members who file claims will agree to release the defendants from all liability regarding "NFL Sunday Ticket or NFL football telecasts or other NFL television programming, whether by broadcast, television, cable television, cable television, satellite television, the internet or any other form of technology." The release, however, is conditioned on the NFL continuing to sell Single Sunday Ticket as an alternative to NFL Sunday Ticket. If the NFL drops Single Sunday Ticket, but continues to sell NFL Sunday Ticket, the release becomes null and void.

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[2] As discussed by counsel at the hearing in this matter, the NFL is only required to provide this new satellite television option if it continues to sell NFL Sunday Ticket.

Finally, under the Settlement Agreement, each class representatives will receive an incentive award up to $1,000 each for their time and effort.

Pursuant to Federal Rule of Civil Procedure 23(a), a court may grant conditional approval of a class action if the plaintiff establishes the four prerequisites of numerosity, commonality, typicality, and adequacy of representation. See Fed.R.Civ.P. 23(a). For the following reasons, the court finds that the plaintiff has established all four prerequisites. First, the numerosity requirement is met because the class size exceeds 1.8 million individuals, thereby making joinder impracticable. Second, the commonality requirement is met because every class member was similarly harmed by the defendants alleged antitrust practice of selling all Sunday NFL games for the entire season in one package, and, therefore, common questions of law and fact exists. Third, the typicality requirement is met because the plaintiffs all have the same claims against the defendants. Finally, the adequacy of representation requirement is met because counsel is well-known and experienced in antitrust litigation and there is no conflict among individual claims of the representative plaintiffs and the putative class members. See Fry v. Hayt, Hayt, & Landau, 198 F.R.D. 461, 467-69 (E.D.Pa. 2000).

In order for this court to conditionally approve this

lawsuit as a class action, the plaintiffs must also satisfy the requirements of either Rule 23(b)(2) or Rule 23(b)(3). Under Rule 23(b)(3), an action may be maintained as a class action if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the action is superior to other available methods." Fed. R. Civ. P. 23(b)(3). Because the court finds that the plaintiffs have met the requirements for Rule 23(b)(3), the court will conditionally approve class certification in this case.

The Supreme Court has stated "predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997) (emphasis added). In this case, the court finds that the predominance test is met because plaintiffs' claims focus on three basic issues that are common to all putative class members: (1) Whether defendants engaged in a contract, combination to fix, raise or stabilize the prices of NFL Sunday Ticket or to restrict output in non-exempt channels of distribution; (2) Whether defendants' conduct caused injury to the class; and (3) Whether damages can be proved on a class-wide basis. See In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 484 (W.D.Pa. 1999) (noting predominance test is met in antitrust case because "consideration of the conspiracy issue

would, of necessity, focus on defendant's conduct, not the individual conduct of the putative class members"); Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., No. 3: CV-86-0386; 1992 WL 212226 *3 (M.D.Pa. 1992) (stating "[p]roof of impact and causation can be established on a class-wide basis if all plaintiffs were victims of the same conspiracy and all were affected to one degree or another by the conspiracy").

"In order to meet the test for superiority, the court must 'balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.'" Fry, 198 F.R.D. at 470 (quoting In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283, 307-08 (3d Cir. 1998)). In this case, "the utility and necessity of presenting the claims asserted in this action through the class action method is substantial 'since a large number of individuals may have been injured, although no one person may have been damaged to the degree which would have induced him to institute litigation solely on his own behalf.'" Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 648 (W.D.Pa. 1988) (quoting Green v. Wolf Corp., 406 F.2d 291, 296 (2d Cir. 1968); ; see also In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 489 (W.D.Pa. 1999) ("Individual actions would be unnecessarily duplic[ative], expensive, and time-consuming, particularly in light of the predominance of common questions of the alleged

conspiracy . . . .").

Pursuant to Rule 23(e) and Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), the court finds that the parties proposed settlement is fair, adequate, and reasonable. In reaching this conclusion, the court has considered the nine (9) factors outlined in Girsh:

> 1) the complexity, expense, and likely duration of the litigation;
> 2) the reaction of the class to the settlement;
> 3) the stage of the proceedings and the amount of discovery completed;
> 4) the risks of establishing liability;
> 5) the risks of establishing damages;
> 6) the risks of maintaining the class action through trial;
> 7) the ability of the defendants to withstand a greater settlement;
> 8) the range of reasonableness of the settlement fund in light of the best possible recovery;
> 9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 157 (citing City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir 1974).

As explained by counsel at the hearing on this matter, the parties' have shown that several Girsh factors weigh in favor of preliminary approval of the proposed settlement. First, continuing this antitrust litigation is likely to result in a protracted legal battle with several appeals which will be highly expensive. Second, the settlement is unlikely to generate

objections from putative class members who, individually, do not have large financial damages, but, instead, whose injuries are correctable, at least in part, through an injunction requiring the NFL to sell "Single Sunday Package." Third, the plaintiffs have conducted substantial discovery such that they were well informed concerning the strengths and weakness of their case upon entering into settlement negotiations with the defendants. Fourth, establishing liability in this case will be difficult as the case involves somewhat novel issues of antitrust law and concerns a highly technical aspect of broadcasting. Establishing liability is also made more difficult because the alleged restraint of trade in this case is not per se illegal, but requires application of the rule of reason test.[3] Fifth, there exists risks to establishing damages because the parties disagree whether the putative class members are indirect purchasers and, therefore, whether or not they are entitled to damages.[4]

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[3] "In construing and applying the Sherman Act's ban against contracts, conspiracies , and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' . . . , and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further explanation under the rule of reason generally applied in Sherman Act cases. This pro se rule is a valid and useful tool of antitrust policy and enforcement." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7 (1979).

[4] In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Court addressed the question whether indirect purchasers possess standing to recover damages in antitrust actions. Although the Court found that indirect purchasers may not recover

Girsh factors eight and nine also weigh in favor of preliminary approval of the proposed settlement. Based on an analysis of the value of all the components of the settlement, counsel represented that the settlement is worth $28.5 million. In comparison, counsel's expert has estimated the best possible recovery at $57.5 million. Given the difficulties of establishing liability and damages in this somewhat novel and complex antitrust case, the court finds that the proposed settlement is within the range of reasonableness such that it deserves preliminary approval. In reaching this conclusion, the court finds, based on the representations made by counsel at the hearing and the declarations submitted to the court by Howard J. Sedran, Esq. and Peter J. Nickles (doc. no. 95), that there is no evidence of collusion on the part of the attorneys and the settlement appears to be the product of "good-faith, arms-length negotiations." Collier v. Montgomery County Housing Authority, 192 F.R.D. 176, 185 (E.D.Pa. 2000) (quoting Newberg on Class

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damages in antitrust actions, it stated that the indirect purchaser bar may not be applicable "where the direct purchaser is owned or controlled by its customer." Id. at 736 n.16. In McCarthy v. Recordex Service, Inc., 80 F.3d 842 (3d Cir. 1996), the Third Circuit addressed the owner or control exception. The McCarthy court determined that plaintiffs in the case, attorneys representing plaintiffs filing malpractice actions, did not qualify for the Illinois Brick exception to the indirect purchaser prohibition. Id. at 853. In this case, the parties disagree as to whether or not, under McCarthy, plaintiffs fall under the Illinois Brick exception.

Actions, § 11.25, at 11-37).[5]

Because the court has tentatively approved the settlement, "notice of the certification and of the proposed settlement may be considered together." Fry, 198 F.R.D. at 474. In this case, the court approves the parties proposed method of notice for this class action settlement. Under the terms of the settlement, the settlement administrator will send individual notices to putative class members identified by the NFL as well as publish the summary notice in USA Today. The court finds that efforts sufficiently meet the requirements for notifying the putative class members regarding this settlement agreement. In addition, the court finds that the forms of notice submitted to the court on March 9, 2001 adequately inform putative class members of the nature of the litigation, the nature of the settlement, the possible number of class members, the possible recovery for individual members of the class, the requested amount of attorneys' fees, and the amount class representatives requested for an incentive award.

AND IT IS SO ORDERED.

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[5] The court finds that the representative plaintiffs, as set out in the Settlement Agreement, are entitled to an incentive award of up to $1,000. The representative plaintiffs, however, must establish by affidavits their entitlement to such an award based on the time and money they invested in the litigation. See Fry, 198 F.R.D. at 473.

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EDUARDO C. ROBRENO, J.